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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1930.

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THE PERMUTIT COMPANY,

*Petitioner,*

*v.*

GRAVER CORPORATION,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

## BRIEF IN SUPPORT THEREOF.

---

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THE PERMUTIT COMPANY,
Petitioner,
vs.
GRAVER CORPORATION,
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## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Permutit Company, respectfully prays for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree of that Court entered October 20, 1930, in a suit for infringement of a patent (R. 691).

A transcript of the record in the case, including the proceedings of said Circuit Court of Appeals, is furnished herewith in accordance with Rule 35 of this Court.

### Summary and Short Statement of the Matter Involved.

This was a suit in Equity brought in the United States District Court for the Northern District of Illinois, Eastern Division, by your Petitioner, against Graver Corporation for infringement of claims 1 and 5 of Letters Patent No.

1,195,923 (R. 584), owner by mesne assignments from Robert Gans, for Apparatus for Softening Water.

Petitioner, by this Petition seeks to bring before this Court for review a decision of the Circuit Court of Appeals for the Seventh Circuit, affirming the decree of Judge Lindley entered in said District Court for the Northern District of Illinois, Eastern Division, holding invalid claims 1 and 5 of said patent No. 1,195,923 (R. 679).

## The Gans Patent in Suit.

The patent (R. 584) relates to zeolite water softeners. Water is hard because it contains the salts of lime and magnesium in solution. The softeners of the patent produce a water which is completely free from hardening constituents and this is accomplished by passing the hard water through a mineral known as zeolites. This substance has the property of changing its chemical composition by exchange and re-exchange of bases. For example, when hard water is passed through zeolites having a sodium base they will give up their sodium to the water and take, as a new base, the lime and magnesium of the water. This "softens" the water. After the zeolites have become exhausted they may be regenerated by passing a sodium solution (common salt) through them and thus they give up their new base of lime and take back their original sodium base. The bed must then be thoroughly cleansed of all salt solution.

The apparatus of the patent is simple but involves the recognition of problems which were not solved by any prior device.

The patent contains a complete disclosure of apparatus which consists of a cylindrical container having a perforated plate near the bottom upon which rests a layer of gravel. The gravel supports the bed of zeolites and an important feature is that the zeolites be not confined at the top but have sufficient space into which to rise or boil when there is an upward flow of water through the apparatus.

Zeolites act by chemical action and to utilize this property they must be kept clean and the water must flow uniformly through the entire bed, so as to make the exchange process rapid and thorough, and to utilize all the zeolites uniformly. Zeolite water softeners are thus distinguished from filters in that the former involve a chemical action necessitating clean zeolites and uniform flow through the bed while the latter is a simple mechanical action and will continue to operate when the filtering material is slime coated.

Complete piping connections are shown in Figures 1 and 3 of the patent so that the hard water may be run into the casing through the zeolite bed and out to the soft water service line. The connections also provide for the regenerating flow of brine, the complete removal of the contaminated brine solution and the washing operation.

It is immaterial whether the softener be used as an upflow or downflow softener as both uses are within the disclosure of the patent. Claim 1 is limited by disclaimer to downflow softeners, but Claim 5 is not so limited.

## The Gans Patent was Sustained in Prior Litigation by the Courts of Appeal of the Second and Sixth Circuits.

Prior to bringing this suit against the Graver Corporation, your Petitioner brought several suits on this patent in the District Courts of the Second and Sixth Circuits and claims 1 and 5 here in suit have been sustained by the Courts in those circuits.

In a suit brought against the Harvey Laundry & Refinite Company in the Western District of New York, Judge Hazel held claims 1 and 5 to be valid and infringed (274 Fed. 937). This decision was affirmed by the Circuit Court of Appeals for the Second Circuit (279 Fed. 713). The Court of Appeals therafter denied a petition for rehearing filed by defendants in that case and likewise this Honorable Court denied a Petition for Certiorari (259 U. S. 588).

The Gans patent was again sustained by Judge Learned Hand (S. D. N. Y.) on a Motion for Preliminary Injunction in a suit against Paige & Jones Chemical Company (292 Fed. 239). No appeal was taken from this order. Thereafter a second motion was made in the same District Court against the Paige & Jones Company, directed to a changed type of construction. Judge Knox sustained the validity of claims 1 and 5 in suit and granted the injunction. The opinion is not reported. On appeal, the Court of Appeals for the Second Circuit again affirmed the validity and scope of the Gans patent and modified the order of the District Court only to the extent of sending the question of infringement as to certain types of water softener back to the District Court for final hearing. (22 Fed. [2d] 916.) The suit did not go to final hearing, for the defendant took a license under the Gans patent (R. 156).

In a suit against Frank L. Wadham *et al.* (294 Fed. 370)—Eastern District Michigan—Judge Tuttle declined to follow previous adjudications and held claims 1 and 5 of the patent invalid. The Court of Appeals for the Sixth Circuit reversed the District Court (13 Fed. [2d] 454) and sustained the claims.

Claims 1 and 5 of the Gans patent therefore come before this Court with their validity upheld by decisions of the Circuit Courts of Appeal for the Second and Sixth Circuits and by Judge Learned Hand, Judge Hazel and Judge Knox, at Circuit; while the Circuit Court of Appeals for the Seventh Circuit in the instant case holds a contrary view.

As your Petitioner shall show, there was no defense before the Court below having any bearing on the validity of the patent which had not been already considered and overruled by the Courts of other Circuits.

## Reasons Relied on for the Allowance of the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds as set forth in rule 35 of this Court:

The decision of the Court of Appeals for the Seventh Circuit sought to be reviewed is in direct conflict with the decisions of the Courts of Appeal for the Second and Sixth Circuits and there is no new evidence to justify a contrary ruling of the Court.

The principal points decided by the Circuit Court of Appeals for the Seventh Circuit in the case at bar were, that the Gans patent did not cover the novel feature of an unconfined bed of zeolite and that in any case such feature had been anticipated by an article (R. 349-453) in the German language published by Gans on April 15, 1909. It was principally upon these two grounds that the Court reached its conclusion that the patent was invalid (R. 679).

The first of these questions was presented and considered by the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Sixth Circuit and both of those Courts held that the Gans patent did cover the novel feature of an unconfined bed of zeolite; as to the second point, Judge Hand in New York and the Sixth Circuit Court of Appeals both held that the invention had not been anticipated by the above mentioned article published by Gans.

The question whether the Gans patent covered the novel feature of an unconfined bed of zeolite is, of course, one of interpreting the patent. The question as to whether this novel feature had been anticipated by the Gans article depends primarily upon the meaning of the article published in the German language. In the cases, the opposing parties relied, each upon its own translations, and upon the testimony of translators skilled in German. This whole body of evidence was introduced here by stipulation. According to

one of these groups of translations, it was perfectly clear that the novel feature in question was not disclosed by the article and consequently the patent in suit was not barred by two years' prior publication. According to the other translation, which was adopted by the lower courts in the case at bar and is incorporated in the opinion of the Circuit Court of Appeals, there is at least serious doubt as to whether this novel feature was disclosed sufficiently to amount to an anticipation. The other courts take the view that the doubt as to the meaning of the article published in the German language was sufficient to prevent that article from being treated as an anticipation of the invention irrespective of which of the two translations was correct.

It is well settled that in a suit of this character brought in equity, the Appellate Court has power to review the questions of fact as well as questions of law and that if the Supreme Court issues a writ of certiorari, it will consider independently any questions of fact with respect to which there was a conflict between the Circuit Courts of Appeal.

*Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177.
*Thomson Spot Welder Co.* v. *Ford Motor Co.,* 265 U. S. 445.

It thus appears that there are conflicts between the decision of the Circuit Court of Appeals in the case at bar and those of the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Sixth Circuit with respect to questions of law and questions of fact, all of which are open to review in this Court.

The petitioner claims that the Circuit Court of Appeals erred in the case at bar in holding (a) that the Gans invention was not properly disclosed and claimed in the patent in suit, and (b) that the subject matter of the Gans patent did not constitute an invention and was anticipated by the prior art, (c) and that certain of defendant's structures did not infringe.

## All the Defenses Raised in the Present Case had been Passed on and Rejected by the Other Courts.

The other Circuit Courts recognized that the invention of Gans was properly disclosed and claimed in the patent and that it was not anticipated by any prior art. As the Court of Appeals for the Sixth Circuit said:

> "It is true that under the construction which we give the patent, and in order to sustain the patentable novelty of the device, the claim must be limited so as to involve the use of a zeolite bed which is free and unconfined upon the top, and that the specification does not expressly state this limitation nor does the exact language of the claim compel it. Nevertheless, the claim may be sustained without going beyond the liberality of construction proper to this patent. If the specifications and drawings of a patent show a structure clearly involving a certain theory of operation, it is not necessary that the patentee should expressly describe this theory, nor indeed that he should at that time clearly understand it. *Goshen Co.* v. *Bissell Co.*, 72 F. 67, 74, 19 C. C. A. 13. The specification and drawing provide for the occasional descent into the zeolite bed from above of a revolving stirrer, and this makes it clear that the top of the zeolite must be free and unconfined, under the contemplation of these claims, like 1 and 5, which do not imply the nonuse of the stirrer. Limitations upon a claim may not be imported from an ambiguous specification into an unambiguous claim for the sake of saving the validity of a patent (*McCarty* v. *Lehigh*, 160 U. S. 110, 116, 16 S. Ct. 240, 40 L. Ed. 358); but, where the specification clearly shows that the inventor contemplated the limitation, and where the language of the claim is not clear to the contrary, it may be so construed by reference to the specification that the patent may prevail (*Lamb* v. *Lamb*, C. C. A. 6, 120 F. 267, 269, 56 C. C. A. 547); and the fact that the claim does not say, 'substantially as described,' is not controlling (*National Co.* v. *Mark*, C. C. A. 6, 216 F. 517, 515, 133 C. C. A. 13)." (13 Fed. [2d] 454, 458.)

Into the present record there was stipulated the testimony of plaintiff's witnesses Norton, Applebaum and Howlett (R. pp. 279-309). This testimony was also before the Sixth Circuit Court and shows the great commercial success of the Gans invention and that at the time of its introduction into the United States, in 1913, it created the art of softening water. The testimony and exhibits also show that as late as 1919 (when the testimony was taken) the zeolite water softener of the Gans patent in suit embodied the *only commercial method of softening water to zero hardness.* This proof was substantiated by the testimony at the trial of the present case which also showed that even up to the present time no other apparatus for commercially softening water has been developed. All of this stands uncontradicted on the record and defendant did not offer any proof to the contrary.

The Court of Appeals of the Second Circuit in *Permutit Co.* v. *Harvey Laundry Co., et al.,* 279 Fed. 713, at page 716, found:

> "By the use of the apparatus in suit, for the first time, zero[1] water has been produced. Theretofore, in the art, water softening consisted solely of the use of a precipitation apparatus which did not produce soft water. Men deeply interested in the art have been turning their inventive minds toward this problem for half a century. The appellee was the first to produce the result."

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[1] These devices have to remain in service indefinitely. The only attention given them is, to test the effluent to ascertain if it is soft. When a trace of hardness appears, the normal operation is stopped, dirt which may have accumulated in the bed is removed by upward washing, the brine or regenerating solution is passed through, and then rinsing follows to remove the last traces of brine. Whereupon the normal function of the apparatus is resumed. It is this ability, with a single device, to produce completely soft water, or to restore at once such ability which is characterized by the Court as the production of zero water.

The Court of Appeals for the Sixth Circuit in *Permutit Co.* v. *Wadham et al.*, 13 Fed. (2d) 454, at page 455, likewise recognized that the patent in suit created a new industry:

> "The process has gone into enormous use in this country, and rarely is there a case where a new art and industry are founded solely upon, and grow entirely from, a patent, so clearly as in this case. It is not claimed that there was ever any practice of the process by any one in the United States before the Gans application, and it is not to be denied that the entire commercial activities of all makers in this country have grown out of the commercial exploitation here by the owners of the patent."

Dr. Gans had long known of the properties of the natural zeolites and had already made important discoveries in the manufacture of artificial zeolites, but it took months and months of experimentation by him and his associates before an apparatus was worked out which would operate commercially for the softening of water in continuous use (R. 173-184). It is significant that all of the prior art structures were failures and the record shows that all differed from the successful Gans device in the very particulars which prevented them from operating successfully.

All of the alleged anticipations in the instant case, with the exception of one item, had already been before the other Courts and had been fully considered by them and rejected. The record is not "somewhat different" from that on the other appeals, in any respect which is in any way material, and the lower court was in error in so stating. The one new "defence" is an article in the German language by Weiss (R. 523-545) and admittedly it represents a discussion of Gans' own work. It cannot be a bar to the Gans patent in suit for it is simply a discussion of Gans' own work on the removal of *manganese* from water and does not relate to a water softening device. The date of the article (June 3, 1910) also precludes its use against the patent in suit for it was published in Germany less than two years before the

United States application was filed (which was August 5, 1911). However, this Weiss article is of no importance here for it is not mentioned by the Court of Appeals below and apparently was considered irrelevant by it.

The Court below found that the article in the German language by Gans (R. 349-453), published in the "Chemische Industrie" on April 15, 1909, constituted an anticipation of the patent in suit. This is directly contrary to the other courts, although the evidence about it was sipulated into this case from the earlier cases. The article contains no drawing and it does not show or describe the invention of the patent, for it does not disclose the free and unconfined zeolite bed which is a necessity for the successful operation of a water softener. The testimony before the Court in regard to this article is identical with that before the other courts and consists of translations by some sixteen different translators. There is a sharp conflict over the translation of some six lines in the long German text. The lower court finds a disclosure of the free zeolite bed in the translation which it adopted while it is clear that in the other translations there is no suggestion of anything but the old and unsuccessful confined zeolite bed. The conflict is unquestionably an honest one and clearly shows the ambiguity in the German text. When such ambiguity exists in a foreign language publication, a court should not, years after the event, attempt to resolve the ambiguity and spell out anticipation of the United States patent. As Judge Learned Hand said in holding that the ambiguity settled the point against the defendant:

> "About this clause the learned doctors disagree, and it seems to me quite enough to say that the disagreement is honest without trying to solve it, which would be quite beyond my powers. *To be a valid anticipation greater clarity is necessary, else there is no adequate warrant that the art was enriched.*" (*Paige-Jones Case*, 292 Fed. 239, 241—Italics ours.)

The Court below was likewise in error in regard to the disclosure of other items of the prior art. The Leister Ger-

man patent (R. 653) and the Rundschau German article (R. 461) both show devices which had *confined* zeolite beds, and for that reason neither would be operative.

The filter patents (R. 590-630) do not negative invention in the Gans patent for they do not disclose a recognition of the problems involved in the design of a zeolite water softener and not one of them could be used as a water softener without complete reorganization.

The courts below wrongly interpreted the prior art in that they minimized the changes necessary for their use as a water softener and regarded that which could be done after the disclosure of Gans as within the knowledge of the art before it was enriched by the patent in suit. All of these items of the prior art were before the other courts and were discarded by them.

The District Court below said nothing on the subject of infringement.

The Court of Appeals after declaring the claims to be invalid (R. 689) added that, because defendant's "presently used structures", "have their openings near the bottom but not at the lowest point of the casing", they "do not infringe claim 5". In this respect also the decision is at variance with the scope awarded the claim by the decisions of the Circuit Court of Appeals for the Second and Sixth Circuits; since in both the *Wadham* case (as shown in the defendant's device at p. 493) and the *Paige-Jones* case (as shown at p. 497) the outlets were "near the bottom but not at the lowest point of the casing"; yet both were held to infringe, notwithstanding.

Thus the decision below is in direct conflict, as to both validity of and scope of the patent in suit, with the decisions of two other Courts of Appeal which had the same patent and the same evidence in all substantial respects.

Wherefore your Petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding said Court to certify and send to this Court on a day to be designated, a

full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that said judgment of said Circuit Court of Appeals be reversed and that your Petitioner be granted such other and further relief as may be proper.

Dated: New York, N. Y.,
January 16, 1931.

DRURY W. COOPER,
GRAHAM SUMNER,
GEORGE A. CHRITTON,
Attorneys for Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

DRURY W. COOPER, being duly sworn, deposes and says, that he is attorney for the Petitioner herein; that he is familiar with the record and has read the foregoing petition and that the allegations thereof are true as he verily believes.

DRURY W. COOPER.

Subscribed and sworn to before me this 16th day of January, 1931.

M. E. McKinch
Notary Public.

(Seal)

Notary Public
New York County
Certificate No. 147
Register No. 1 Mc. 86

## BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Statement.

The facts are sufficiently stated in the petition. The date of the judgment of the U. S. Circuit Court of Appeals, to be reviewed, is October 20, 1930. The statute under which the jurisdiction is invoked is Judicial Code 240(a), as amended by the Act of February 13, 1925.

The specifications of error, which your petitioner will urge, if the writ of certiorari is granted, are that the U. S. Circuit Court of Appeals for the Seventh Circuit erred in finding (1) claims 1 and 5 of the Gans patent in suit are invalid and (2) that claim 5 is not infringed by defendant's "presently used structures".

### ARGUMENT

#### I.

**The Circuit Court of Appeals for the Seventh Circuit, in holding claims 1 and 5 of the Gans patent invalid has rendered a decision in conflict with decisions of the Courts of Appeal for the Second and Sixth Circuits and this Court is asked to settle that conflict of decisions.**

There is a square conflict between the decisions of the Courts of Appeal of the Second and Sixth Circuits on the one hand and the decision in the Seventh Circuit in the present case, upon the question of the validity of the Gans patent in suit.

This conflict does not arise out of any differences in the records for there is only one item of art brought forward in the present case which was not before the courts of the other

circuits. That one item, an article by one Weiss, in the German language, is clearly irrelevant as a matter of law and indeed it seems to have been properly so regarded for it is not mentioned by the Court of Appeals for the Seventh Circuit in its opinion. The opinion does state, however, that the "record in the instant case is somewhat different from the records presented on the other appeals" (R. 690), but the Court fails to point to any difference that has a bearing upon its decision and Petitioner respectfully submits that such minor differences as do exist are entirely immaterial and have no effect upon the validity or scope of the Gans patent.

## II.

### The Courts of the Second and Sixth Circuits characterized the invention as of the highest order.

The Court of Appeals of the Second Circuit concludes its opinion as follows:

> "This invention has been used by power plants, laundries, tanneries, canneries, and various other manufacturers. It is a great advance in the art of softening water. Its savings to manufacturers has been enormous. It is a new and widely used apparatus in a useful art. It is that class of inventive thought which it was the intention of Congress to protect as a valuable contribution to a useful art. The inventor is entitled to his reward, and the appellee to its protection." (*Permutit* v. *Harvey Laundry Co. et al.*, 279 Fed. 713, at p. 721.)

The Court of Appeals of the Sixth Circuit said:

> "The process has gone into enormous use in this country, and rarely is there a case where a new art and industry are founded solely upon, and grow entirely from, a patent, so clearly as in this case. It is not claimed that there was ever any practice of the process by any one in the United States before the Gans application,

and it is not to be denied that the entire commercial activities of all makers in this country have grown out of the commercial exploitation here by the owners of the patent." (*Permutit Co.* v. *Wadham et al.*, 13 Fed. [2] 454, at p. 455.)

So the patent stands as one for a primary improvement, and thus fulfills the Constitutional purpose of securing a monopoly for that which has "promoted the useful arts."

## III.

## The Gans Invention.

The apparatus of the Gans patent has been described in the petition.

The free zeolite bed of the Gans apparatus is a necessary feature of all successful water softeners, as is abundantly shown by the record. It is likewise a feature which distinguishes Gans from the prior art and is clearly disclosed by the patent. The lower court is in error in regard to the interpretation of the Gans disclosure and claims and is directly in conflict with the opinions of the other courts.

"To ascertain from experience the need of a free surface to the bed was a genuine invention, even if everything else in the machine had been disclosed before." (292 Fed. 239, 240)—*Paige-Jones Case.*

It is also important that proper provision be made for the regenerative flow of the salt solution and the spent brine be completely removed from the casing before the next softening run, there must be no traps or pockets in which the contaminated brine may lodge. This feature likewise is disclosed in the patent and is absent from the disclosure of the prior art.

"Such a process calls for chemical actions and reactions, as distinguished from the mechanical work of the ordinary water filter, thereby involving chemical problems which the most competent experts do not foresee, but in

which apparently small steps turn out to be vital, as, for example, the necessity of draining the salt water from the very bottom instead of from a more convenient point a little higher. None of the experts seemed to know that even a little salt water remaining would interfere with the efficiency of the process." (13 Fed. [2d] 454, at p. 456.)

## IV.

### The Record establishes that the construction of the Gans apparatus constitutes invention.

The patented apparatus produces a new result. For half a century chemists have known, as a laboratory fact, that zeolites could effect a double exchange of bases. This knowledge, however, was hidden within the walls of the laboratories. No one knew how to apply it industrially, no one knew how to produce zero water commercially. An apparatus which is the first to do this and which has effected the startling utilities which this apparatus has effected, certainly produces a new result and constitutes invention.

As early as 1907 Gans made important discoveries in the manufacture of artificial zeolites but at that time he and all the other skilled men were unable to devise an apparatus in which to use zeolites for the commercial softening of water. It was not until 1909 that Gans succeeded (R. 183) in devising his first successful zeolite water softener. This marked the culmination of a long series of experiments.

The history of the development of the successful water softener is interesting and enlightening, for each step in the unsuccessful attempts to solve the problem is marked by some one of the items of the prior art which defendant in this case—just as the defendants in the other suits on the Gans patent had done—brings forward as an alleged anticipation of the Gans patent. All of these items of art were properly held by the other courts not to affect the validity of the Gans invention.

The Court of Appeals for the Seventh Circuit has incorrectly interpreted certain of the references. Its error lies, for the most part, in regarding the work of Gans from the viewpoint of today—after the problems have been solved—and reaching its conclusion in the light of defendant's witnesses who had their introduction into the water softening art years after the issuance of the Gans patent in suit. These men admittedly gained their experience only by study and use of apparatus which was manufactured under the Gans patent; accordingly they spoke merely "from wisdom born after the event." They both visualized the prior art from the point of view of the patentee's accomplishment, and regarded changes which, historically, turned failure into success as within the "expected skill of the calling." Such interpretation of prior art references is not competent against the Gans patent. Invention is clear and cannot be denied.

The testimony before the lower court in regard to the Gans "Chemische Industrie" article of 1909 (R. 349-453) is identical with that which was before the other courts. The sharp conflict between the groups of competent translators in regard to the meaning of the German text settles the point; the Gans article cannot be considered to be that clear and distinct disclosure which the law required of a foreign publication. So the previous courts ruled.

> "To be a valid anticipation greater clarity is necessary, else there is no adequate warrant that the art was enriched." (292 Fed. 239, 241.)

> "Nothing of earlier date in Germany and unpatented there invalidates the patent unless it was a publication; and the rule is firmly established that an earlier foreign language publication must be clear and explicit in the extreme." (13 Fed. [2d] 454, at p. 456.)

The article cannot be said to disclose a complete and operative structure and it does not disclose the necessary free zeolite bed.

The Court below thinks Gans should have been called as a witness to *explain* his German article. Aside from

the fact that it is nowhere shown that Gans would be available to plaintiff to come to this country to testify, the remark of the Court is improper as a matter of law. The relevancy of the Gans article cannot be a question of what Gans *intended* to say or what he *had in mind*.

> "If prior patents and publications can be reconstructed by extraneous efforts to fit the exigency of the case, it would, as was said in *Badische Anilin & Soda Fabrik* v. *Kalle & Co.*, 104 Fed. 802, 44 C. C. A. 201, require an inquiry, not only as to what the publication communicates to the public, but 'it will be transferred to an endeavor to ascertain what its author intended to communicate.' We cannot read into this article what is not there, and which it would be necessary to obtain from the later development of the art in order to meet with appellee's success." (279 Fed. 713 at 719.)

The question simply is what did the German article disclose to the American public *prior to the date of the United States application*. The law in regard to the clarity required of a foreign publication is well established and needs no citation of authority.

From the disagreement of the translators the conclusion must inevitably be that the German article of Gans does not disclose the invention of the patent in suit and cannot be said to constitute a bar to the United States patent. The Courts of the Second and Sixth Circuits were right.

Again the Court below held that the German patent to Leister (R. 653) anticipates Gans. This holding is directly contrary to the Court of Appeals of the Sixth Circuit for it was there properly recognized that the Leister patent did not disclose the necessary free zeolite bed of Gans and cannot anticipate the Gans invention.

> "The point most stressed is with reference to the Leister German patent. This was not before the Court of Appeals in New York, but it was before Judge Hand,[1] and we concur in his view of it. Passing all other ques-

[1]The Leister patent was later before the Court of Appeals for the Second Circuit in *Paige Jones* case.

tions, it might be assumed that the Leister patent disclosed the patented thought, save for one exception. It now conceded that the zeolite bed must be free and unconfined upon its upper surface. The reason is that upon the backwash it must boil, so that the finer and lighter particles will go to the top and will then settle into a relatively impervious stratum, whereby the water when the softening operation begins will percolate through all parts and will not find free channels. In earlier instances of analogous effort, the zeolite bed had been supported by a screen upon the bottom, and it had been held down from the top either by a screen or by an immediately superposed bed of filter material. It is the claim of defendant that the Leister patent shows a zeolite bed free at the top. In deciding whether it does, the specification does not aid the drawing; and the drawing, which is a vertical cross-section of the whole structure, is in this respect obscure. There is an open space above the zeolite bed. The bottom and top of the zeolite bed are marked by heavy lines. It is conceded that the lower line indicates a supporting screen. Plaintiff says the upper line indicates a holding down screen. Defendant says it merely indicates conventionally the situation at the top of the zeolites. Similar lines above and below the nearby filter bed do indicate screens. Other inferences also are rather persuasive that this line represents a screen; but the very existence of the ambiguity is fatal to the defense. The fact that the Leister patent was soon forfeited for nonpayment of the trifling annual fee is confirmatory evidence that it was not the solution of the problem." (13 Fed. [2d] 454, at p. 457.)

The Rundschau article (R. 461-467), also published in Germany, was held by the lower court to anticipate the Gans invention; the Court failed to note that, like other items of the unsuccessful prior art, this device had a confined zeolite bed. The court is also in error in stating that the Rundschau article disclosed a device which provided for the complete removal of spent brine after regeneration.

All of the filter patents (R. 590-630) were likewise before the other courts and properly held by them to be incapable of use as zeolite water softeners unless entirely reorganized and

the features of the filter patents then thought of importance, discarded. Not one of them can be used without this reorganization and it is impossible unless done in the light of the teachings of the Gans patent.

> "The fundamental defense, and the one by which the court below was perhaps in the end chiefly moved, was that the device, in substance, uses only the common and well-known method by which water is passed through a filter bed to take out its impurities and then the filter bed is intermittently cleaned of these impurities. It is said that the chemical behavior of the zeolites in the presence of lime and salt water being well known, and the zeolites having become commercially available through Gans' first invention, and the operation of a filter being well known, there was no invention in substituting zeolites for the ordinary gravel or charcoal. This is a forceful argument, but we think a mistaken one. It was simple, perhaps too simple to be invention, to work out this process in the laboratory, or even domestically on a laboratory scale; but that was not worth while. The problem was to do it on a large scale, both economically and efficiently. * * * Upon the whole, we are clear that the novelty of the device is not to be judged merely by the filtration standard." (13 Fed. [2d] 454, at p. 456.)

Other prior art was misinterpreted by the lower Court, none of it discloses the Gans invention and the patent in suit should be sustained.

From the foregoing, it appears that the Circuit Court of Appeals for the Seventh Circuit has rendered a decision which is in conflict with the decisions of two other Circuit Courts of Appeal and which has seriously prejudiced the rights of your Petitioner.

Respectfully submitted,

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GEORGE A. CHRITTON,
Attorneys for Petitioner.

## Notice of Presentation of Petition.

PLEASE TAKE NOTICE that the foregoing petition for a writ of certiorari and brief was filed with the Clerk of the Supreme Court of the United States in the City of Washington, D. C., on January , 1931.

Dated January , 1931.

To:

Counsel for Respondent.

Due and timely service of a copy of the within petition for certiorari and brief, together with a copy of the printed record and a notice that the petition had been filed with the Clerk of the Supreme Court of the United States, at Washington, D. C., on January , 1931, is hereby acknowledged this January , 1931.

Counsel for Respondent.